

ENROLLMENT REFERENCE MANUAL

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1. WHY IS ENROLLMENT IMPORTANT?

The Chiefs of the Yukon First Nations travelled to Ottawa in 1973 to meet with Pierre Trudeau, who was the Prime Minister at the time, and Jean Chretien, then the Minister of Indian Affairs. At this meeting, the Chiefs presented a document entitled *Together Today For Our Children Tomorrow* that proposed the negotiation of a comprehensive land claim agreement in the Yukon Territory.

In *Together Today For Our Children Tomorrow*, the Chiefs set out a vision of hope for their communities based on social well-being, political autonomy and economic independence. The Chiefs articulated a frustration that others were developing the lands and resources of their traditional territories and the jobs and wealth generated by that development benefited others while their communities suffered the social and economic consequences of a resource-based boom-and-bust economy.

The Government of Canada accepted the proposal and negotiations for a treaty for Yukon First Nations commenced. After a twenty-year negotiation process with the Council for Yukon Indians, the predecessor of the Council of Yukon First Nations (the “CYFN”), Government of Canada and Yukon Government signed the Umbrella Final Agreement (the “UFA”) on May 29, 1993. Each Final Agreement incorporates the provisions of the UFA and includes specific provisions that address the unique circumstances of that Yukon First Nation.

The Teslin Tlingit Council, Nacho Nyak Dun First Nation, Vuntut Gwitchin First Nation, and Champagne and Aishihik First Nations signed their Final and Self-Government Agreement on May 29, 1993. Subsequently seven other Yukon First Nations signed their respective Final and Self-Government Agreements.¹ Today eleven of the fourteen Yukon First Nations are self-governing and three remain bands under the *Indian Act* (Canada).²

The land claims package of the Yukon First Nations is complex: the Final and Self-Government Agreements constitute the core of the package and there are several collateral agreements related to implementation, financial transfers, program and service transfers, tax sharing and administration of justice. While the Yukon First Nation Final Agreements are land claim agreements within the meaning of section 35 of the *Constitution Act, 1982* (Canada), the Self-Government Agreements are not part of the Canadian constitution. A Self-Government Agreement cannot be amended without the consent of the affect Yukon First Nation.

The beneficiaries of the Final Agreements – who are referred to as “Yukon Indian People” in the UFA – have specific rights and benefits under the Final Agreements. In some cases, these rights

¹ The Little Salmon/Carmacks First Nation and Selkirk First Nation signed in 1997, the Tr’ondëk Hwëch’in signed in 1998, the Ta’an Kwach’an Council in 2002, the Kluane First Nation in 2003, the Kwanlin Dun First Nation in 2005 and the Carcross/Tagish First Nation in 2005.

² The White River First Nation, Liard First Nation and Ross River Dena Council.

and benefits include the right to undertake certain activities or interests in certain properties or assets. These rights and benefits include the following.

- **Right to harvesting for Subsistence**³. A beneficiary has the right to harvest Fish and Wildlife for Subsistence, in any numbers, at any time during all seasons of the year, within their Traditional Territory, on Settlement Land and vacant Crown Land. The harvesting rights of beneficiaries can be restricted only for Conservation, public health or public safety.⁴

A beneficiary must obtain the consent of another Yukon First Nation in order to harvest Fish or Wildlife in that other Traditional Territory or obtain a hunting or fishing licence and harvest in accordance with territorial laws.

A “Total Allowable Harvest” may be established pursuant to a Final Agreement in order to limit the harvest with respect to a certain Fish or Wildlife species due to Conservation. The Total Allowable Harvest guarantees that, if harvesting limits are placed on a species, the Subsistence needs of beneficiaries will be given priority while providing for the reasonable needs of other harvesters.⁵

A beneficiary has a right to trap for Subsistence. But if they are trapping for commercial purposes, they must comply with the territorial trapping laws.⁶

A Yukon First Nation will provide to a beneficiary proof that he or she is enrolled as a beneficiary in its Final Agreement or has been given consent to harvest for Subsistence in its Traditional Territory.⁷

- **Right to use Forest Resources**. A beneficiary has the right to harvest Forest Resources on Crown Land within its Traditional Territory related to the exercise of their traditional pursuits (such as hunting, fishing, trapping and gathering) and traditional customs.⁸
- **Right to use Water for Traditional Uses**. A beneficiary has the right to use Water for a Traditional Use in the KDFN Traditional Territory, subject to the laws that generally apply in respect of Water.⁹ A Traditional Use is the use of Water for trapping, non-commercial harvesting, traditional heritage and cultural purposes.

A beneficiary would be entitled to compensation for any provable loss or damage if the Water Board issues a Water licence that causes substantial alteration in the quality, quantity and rate of flow of Water so as to adversely affect his or her Traditional Use.¹⁰

- **Right to use and occupy Settlement Lands**. Under the terms of the UFA, the Yukon First Nations will collectively retain 16,000 square miles of Settlement Land. It is

³ Capital words and terms in this section reference to the definitions set out in Chapter 1 of the UFA.

⁴ Sections 16.3.3 and 16.4.2 of the UFA.

⁵ Section 16.9.1.1 of the UFA.

⁶ Section 16.4.11 of the UFA.

⁷ Section 16.4.7 of the UFA.

⁸ Section 17.3.1.1 of the UFA.

⁹ Section 14.5.1 of the UFA.

¹⁰ Section 14.8.5 of the UFA.

arguable that beneficiaries have an interest in the Settlement Lands retained by the Yukon First Nation under its Final Agreement. For instance, this interest may include a right to use and occupy certain parcels of Settlement Land for residential purposes and traditional activities in accordance with the Yukon First Nation's laws and policies.

- **Financial benefits.** Under their Final Agreements, the Yukon First Nations receive financial compensation. It is arguable that beneficiaries have an interest in the financial compensation provided to their Yukon First Nation. It is pointed out that some Yukon First Nations provide monthly Elders' payments or an Elders' fuel subsidy to their beneficiaries or enhance certain programs and services for their citizens, such as post-secondary education.

In addition, the last four Final Agreements¹¹ included an Economic Development Strategic Investment Fund (the "Fund").¹² The First Nation may use the monies of the Fund for purposes related to economic development of the First Nation and beneficiaries and training and education of beneficiaries.

Under the UFA, the Yukon First Nation Implementation Fund was established and Canada provided \$4 million (1990 dollars) to the CYFN as the initial capital. The objectives of the Implementation Fund are twofold. Firstly, it is directed to support Yukon First Nations to establish government structures to carry out their responsibilities under the Final Agreements. Secondly, it is directed to support Yukon First Nations and beneficiaries to take advantage of opportunities arising from the Final Agreements.¹³

Similarly the Training Trust was established under the UFA to advance the training of beneficiaries. The Yukon and Canada have each contributed \$3.25 million (1988 dollars) to the Training Trust.¹⁴

It must be pointed out that the beneficiaries' entitlement to these rights and benefits is not absolute. The Yukon First Nations have the exclusive power to enact laws in relation to the management and administration of rights and benefits which are realized pursuant to the Final Agreement and which are to be controlled by the First Nation.¹⁵ This means that the Yukon First Nations can make laws to regulate the rights and benefits of beneficiaries under the Final Agreement.

Aside from the Yukon First Nations' power to make laws relating to the management and administration of rights and benefits under the Final Agreement, the Yukon First Nations also have the power to enact certain laws relating to its citizens – the First Nations' citizenship codes

¹¹ Ta'an Kwach'an Council, Kluane First Nation, Kwanlin Dun First Nation and Carcross/Tagish First Nation.

¹² For example, see section 10 of "Schedule A – Part I – Specific Economic Measures" of "Chapter 22 – Economic Development Measures" of the Carcross/Tagish First Nation Final Agreement.

¹³ Section 28.5.0 of the UFA.

¹⁴ Section 28.6.0 of the UFA.

¹⁵ Section 13.1.2 of the Self-Government Agreements.

must enable all beneficiaries to be citizens¹⁶ – in the Yukon. These laws relate to a broad range of matters, such as the provision of health care and services to its citizens, provision of social and welfare services to its citizens and guardianship, custody, care and placement of children with respect to its citizens. This means that these laws would apply to beneficiaries who are citizens wherever they live or work in the Yukon.

Therefore, enrollment is important in order to identify the beneficiaries of each Final Agreement and confirm who is entitled to exercise specific rights under the Final Agreements and obtain the benefits under those Agreements. It is important to have clarity as to whom the certainty provisions¹⁷ of the Final Agreements apply to.

For many people, enrollment is an integral part of his or her cultural identity. Aside from land claim rights and benefits, enrollment or citizenship also grants community rights, such as eligibility for programs and services administered, delivered and managed by the Yukon First Nation and eligibility to assume a leadership position with the Yukon First Nation.

2. WHAT DOES THE UFA SAY ABOUT ENROLLMENT?

The development of beneficiary lists for each Yukon First Nation was initiated in the 1970s when the land claim negotiations commenced and the Enrollment Commission was established in 1989 to assume that work in accordance with the UFA.

The UFA¹⁸ establishes the criteria for a person to be a beneficiary and the process for a person to apply to be a beneficiary of a specific Final Agreement. The UFA defines a “Yukon Indian Person” to mean a person who is enrolled under one of the Final Agreements in accordance with the criteria established in the UFA. A Yukon Indian Person is a beneficiary.

2.1 Who is eligible to be a beneficiary?

A person may be enrolled as a beneficiary under a Final Agreement if that person establishes that he or she is:

- of 25 percent or more Indian ancestry and lived in the Yukon before January 1, 1940, or is a descendent of such a person; or
- an adopted child¹⁹ of a person who is of 25 percent or more Indian ancestry and lived in the Yukon before January 1, 1940, or the descendent of such a person.

¹⁶ Section 10.3 of the Self-Government Agreements. Also see section XX of the *Yukon First Nation Self-Government Act (Canada)*.

¹⁷ Section 2.5.0 of the UFA.

¹⁸ Section 3.2.0 of the UFA.

¹⁹ The definition of “adopted child” in Chapter 3 of the UFA includes a person who, while a minor, is adopted pursuant to adoption laws in Canada or pursuant to aboriginal customs. See the legal memorandum that discusses custom adoptions in the Yukon in the appendices of this manual.

For the first two years following the date that its Final Agreement is brought into legal effect, a Yukon First Nation could apply to the Enrollment Commission for the enrollment of a person as a beneficiary, who does not meet the enrollment criteria of the UFA, on the basis that he or she has a “sufficient affiliation” with that Yukon First Nation.²⁰ This provision no longer applies since each of the eleven Yukon First Nations has been in legal effect for longer than two years.

The enrollment of a person who is not a Canadian citizen under a Final Agreement as a beneficiary does not mean that that person has any rights or benefits under the *Indian Act*, rights of entry into Canada or of Canadian citizenship.

A person can only be enrolled under one Yukon First Nation Final Agreement.²¹

A person who is enrolled in any other aboriginal land claims settlement in Canada cannot be enrolled as a beneficiary under any Yukon First Nation Final Agreement. However, such a person may be enrolled under a Yukon First Nation Final Agreement if that person ceases to be enrolled under that other settlement in Canada.²²

2.2 The role of the Enrollment Commission

The CYFN, Government of Canada and Yukon Government established the Enrollment Commission in 1989 to deal with matters relating to enrollment of beneficiaries under the Final Agreements. The UFA set out the duties of the Enrollment Commission, including responsibility to:

- prepare, certify, publish and advertise the initial official enrollment list for each Yukon First Nation;
- establish the initial official enrollment that lists the name of each person who is entitled to be enrolled as a beneficiary in accordance with the UFA; and
- hear and determine any appeal initiated on its own motion or by an applicant, a Yukon First Nation, the CYFN, Government of Canada or Yukon Government arising from any decision of an enrollment committee.

The Enrollment Commission ceased its responsibilities on February 14, 2005 – which was the tenth anniversary of the date that the federal settlement legislation was brought into legal effect - except with respect to matters pending before it. Before it was dissolved, the Enrollment Commission delivered all its documents and records to the Dispute Resolution Board.

2.3 Enrollment commissions

Each self-governing Yukon First Nation established an enrollment committee composed of no

²⁰ Section 3.2.2.4 of the UFA.

²¹ Section 3.2.5 of the UFA.

²² Section 3.4.0 of the UFA.

more than five members of that Yukon First Nation.²³ The responsibilities of an enrollment committee ceased, except with respect to matters pending before it, two years after the date that the Final Agreement came into legal effect and the committee had to deliver all its documents and records to the affected Yukon First Nation.²⁴

Among its powers and duties, each enrollment committee: reviewed, updated and amended the existing enrollment or beneficiary list of that Yukon First Nation; and decided, upon receiving an application for enrollment, whether such applicant was entitled to be enrolled in accordance with the UFA.²⁵

After an enrollment committee was dissolved, a person seeking enrollment as a beneficiary must make an application to the appropriate Yukon First Nation. The Yukon First Nation must determine whether the applicant is entitled to be enrolled under its Final Agreement in accordance with the UFA. It should be noted that the Self-Government Agreements require the constitution of each Yukon First Nation to provide a citizenship code that includes the requirements for citizenship in that Yukon First Nation and the procedure for determining whether a person is a citizen.

If the Yukon First Nation rejects the application or refuses to make a decision within 120 days, then the applicant can make an appeal to a single arbitrator appointed by the chairperson of the Dispute Resolution Board.²⁶

As discussed below, the Chief and Councils of some Yukon First Nations have assumed the enrollment functions of that Yukon First Nation and may be the decision-maker with respect to enrollment applications based on the recommendation of a technical committee. Other Yukon First Nations have established citizenship committees to carry out the enrollment functions, including decision-making with respect to applications, independently from the Yukon First Nation. This would ensure that the decision-maker is at arm's-length from the Chief and Council and avoid any reasonable apprehension of bias.

2.4 Role of Dispute Resolution Board

Upon the dissolution of the Enrollment Commission, the Dispute Resolution Board assumed new responsibilities with respect to enrollment matters.²⁷ In particular, the chairperson of the Dispute Resolution Board will appoint a single arbitrator to hear and determine an appeal from any decision of a Yukon First Nation with respect to enrollment. To that end, the Dispute Resolution Board was granted new powers and duties, including:

- the duty to establish and publish of its procedures, including procedures with respect to appeals from decisions of a Yukon First Nation in relation eligibility and

²³ Section 3.5.1 of the UFA.

²⁴ Section 3.9.1 of the UFA.

²⁵ Section 3.5.3 of the UFA.

²⁶ Section 3.10.2 of the UFA.

²⁷ Section 3.11.2 of the UFA.

- enrollment under Chapter 3 of the UFA;
- the power to direct and compel the production of documents and the attendance of witnesses with the exception of Ministers of the Government of Canada or Yukon Government, as provided to a board of inquiry under the *Public Inquiries Act* (Yukon);
- the duty to hear and determine matters before it arising under Chapter 3 of the UFA in accordance with the principles of natural justice;
- the powers necessarily incidental to the discharge of an arbitrator's duties in considering matters under Chapter 3 of the UFA; and
- the duty to carry out any other responsibility assigned to the Enrollment Commission under Chapter 3 of the UFA.

It should be noted that if a Yukon First Nation or its citizenship committee fails or refuses to make a decision within 120 days, then an appeal may be made to a single arbitrator appointed by the chairperson of the Dispute Resolution Board.²⁸ In his or her decision, the arbitrator may impose such measures as he or she sees appropriate.

The Dispute Resolution Board must notify the applicant, Government of Canada, Yukon Government, the CYFN and the affected Yukon First Nations of additions to or deletions from official enrollment lists as a result of decisions made by the arbitrator.²⁹

The decision or order of the arbitrator will be enforceable as an order of the Supreme Court of the Yukon.³⁰ All decisions of the arbitrator are subject to judicial review³¹ on the grounds that the arbitrator:

- failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- erred in law in making its decision or order, whether or not the error appears on the face of the records; or
- based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.³²

Any affected Yukon First Nation, Government of Canada and Yukon Government, and any other affected person is entitled to be a party in respect of an appeal or application for judicial review with respect to an enrollment decision or order.³³

The Dispute Resolution Board must maintain the confidentiality of the documents and records

²⁸ Section 3.10.2 of the UFA.

²⁹ Section 3.11.2.6 of the UFA.

³⁰ Section 3.11.4 of the UFA.

³¹ Section 3.11.5 of the UFA.

³² These grounds for judicial review are set out in section 3.7.1 of the UFA.

³³ Section 3.11.3 of the UFA.

that were provided to it by the Enrollment Commission.³⁴

Any Person may examine the official enrollment list maintained by a Yukon First Nation during its usual business hours.³⁵

3. WHAT DOES THE SELF-GOVERNMENT AGREEMENT SAY ABOUT ENROLLMENT?

Under its Self-Government Agreement, which was negotiated pursuant to “Chapter 24 - Yukon Indian Self-Government” of the Final Agreement, a Yukon First Nation has powers and authorities to make decisions and govern in a manner consistent with its cultural values and institutions.

The Self-Government Agreement does not refer generally to a “Yukon Indian Person.”³⁶ Instead it refers to a “citizen” which is determined by the citizenship code that forms part of the Yukon First Nation’s constitution. The various elements of the citizenship codes, including the determination of citizens, are discussed below.

The Self-Government Agreement directs that the Yukon First Nation constitutions must include a citizenship code that includes the requirements for citizenship in that Yukon First Nation and the procedure for determining whether a person is a citizen.³⁷ It also directs that the citizenship code must permit all persons who are enrolled under its Final Agreement as beneficiaries to be citizens.³⁸ As discussed below, most Yukon First Nation citizenship codes provide that a person is eligible to be a citizen if he or she is enrolled as a beneficiary under Chapter 3 of the UFA or was included on its list of status Indians on the date that the Final Agreement came into legal effect.

The Self-Government Agreement acknowledges the exclusive power of the Yukon First Nation to enact laws in relation to the management and administration of rights or benefits which are realized pursuant to its Final Agreement by beneficiaries under the Final Agreement and that are controlled by the First Nation.³⁹ Also the Yukon First Nations have the power to enact certain laws that apply to its citizens wherever they are in the Yukon.⁴⁰

4. SUMMARY OF KEY ELEMENTS OF YUKON FIRST NATION CITIZENSHIP CODES

³⁴ Section 3.11.1 of the UFA.

³⁵ Section 3.12.1 of the UFA.

³⁶ The Kluane First Nation Self-Government Agreement only makes reference to “Yukon Indian People” in sections 16.3.7 and 25.3. This is consistent with the Self-Government Agreements of the other Yukon First Nations. The Self-Government Agreement incorporates the definition of “Yukon Indian People” set out in the Final Agreement.

³⁷ Section 10.1.1 of the Self-Government Agreement.

³⁸ Section 10.3 of the Self-Government Agreement.

³⁹ Section 13.1.2 of the Self-Government Agreement.

⁴⁰ Section 13.2 of the Self-Government Agreement.

The enrollment provisions of the various Yukon First Nations citizenship codes vary. As a result, it is important to review the citizenship code of the affected Yukon First Nation and not assume that its enrollment processes and procedures are similar to those of the other Yukon First Nations. The citizenship code for each Yukon First Nation is included in the appendices of this manual.

The citizenship code is usually attached as a schedule or appendix to the Yukon First Nation constitution. Some Yukon First Nations have indicated that they are considering the development of a citizenship law. Of course, any such law would have to be consistent with the Yukon First Nation's constitution, including its citizenship code, and its Final Agreement.

The citizenship codes typically include the following provisions.

4.1 The decision-maker

In some citizenship codes, the Chief and Council makes the decisions relating to citizenship applications and related matters based on recommendations made by a technical committee. Some have suggested that political interference or a reasonable apprehension of bias may arise if the Chief and Council is the decision-maker and propose that the decision-maker should act at arm's-length from the Chief and Council.

In other citizenship codes, a citizenship committee is established as the decision-maker to approve or reject applications for citizenship in the Yukon First Nation. It may also have other responsibilities relating to citizenship, such as determining citizenship status of person who renounces or loses his or her citizen. Usually this citizenship committee is comprised of three or four citizens who are appointed by the Chief and Council for a specific term. The membership of the citizenship committee may include an Elder nominated by the Elders Council. This committee is intended to operate independently from the Chief and Council.

The terms of reference for the citizenship committees of certain Yukon First Nations are included in the appendices of this manual.

4.2 Entitlement to citizenship

In general, these provisions of a citizenship code provide that beneficiaries of that Yukon First Nation and the persons included on that Yukon First Nation's status Indian list and the descendants of those persons would be eligible to be a citizen. This means that persons who meet the beneficiary criteria set out in the UFA would be eligible to be citizens. Persons who are included on the status Indian list – including those who may not be beneficiaries – are usually eligible to be citizens as well.

For example, these provisions typically confirm that a person is entitled to be a citizen if that person:

- (a) was registered on that Yukon First Nation's list of status Indians maintained by the Aboriginal Affairs and Northern Development Canada ("AANDC") on the date that

- the Self-Government Agreement was brought into legal effect;
- (b) is a beneficiary of that Yukon First Nation in accordance with Chapter 3 of UFA; or
 - (c) is a child a person who is entitled to be citizen under paragraph (a) or (b).

This means that a citizenship code typically provides that the citizenship list includes the status beneficiaries, non-status beneficiaries and status non-beneficiaries of that Yukon First Nation.

It is the practice of some Yukon First Nations to also consider if an applicant, who meets the eligibility requirements set out in the citizenship code, has a sufficient connection to the community, such as family or cultural ties, to justify enrollment as a beneficiary. For example, this may include whether the applicant's mother is enrolled with that Yukon First Nation. It is suggested that the factors used to determine if a person has a sufficient connection be set out in writing as part of the citizenship code. However, it is pointed out that this practice could be interpreted as conflicting with the UFA by imposing additional criteria on applicants seeking enrollment as beneficiaries.

These provisions may also provide that certain persons, who do not meet the eligibility criteria, may apply to the Yukon First Nation to be honorary citizens, such as persons who are long-term community members or have a special relationship with the Yukon First Nation and its citizens.

4.3 Application procedures

The citizenship codes usually set out the application procedures. These procedures must be based on fairness and transparency and the decision-maker must comply with them. They must be consistent with the Yukon First Nation's constitution and the UFA.

In general, an applicant is required to file an application form for citizenship and file genealogy information, such as baptism or marriage certificates, with the citizenship registrar. If the registrar determines that the application is complete, it will be forwarded to the decision-maker. Where appropriate, the applicant may be required to provide details about his or her ancestry in order to determine the most suitable clan to recognize the applicant.

Each Yukon First Nation has established its application forms and identified the information required to be submitted with that application. See the appendices of this manual to review the generic applications for enrollment and the forms and information required by each of the Yukon First Nations.

4.4 Decisions

Within three months or some other prescribed period after receiving an application from the registrar, the decision-maker is usually directed to reach a decision with respect to that application and advise the registrar and applicant about the decision in writing. In most cases, the decision-maker is not directed to convene a hearing or provide an opportunity for the applicant to present his or her application and evidence.

While the citizenship code may provide that an applicant has a right to appear before the decision-maker in person or by agent, it is suggested that the decision-maker should establish rules for some form of hearing or opportunity for the applicants to participate and make submissions for its consideration. Otherwise, it is arguable that the decision-maker is failing to fulfill its legal obligations, including the duty to follow a fair process, and this may jeopardize for the validity of the decisions. See section 5 below for a discussion of those legal principles.

4.5 Appeal of decisions

It is pointed out that the UFA provides that a single arbitrator appointed by the chairperson of the Dispute Resolution Board can hear an appeal of a decision made by the Yukon First Nation – or its decision-maker, such as a citizenship committee – to reject an enrollment application.⁴¹

In some citizenship codes, the affected persons as well as the Yukon First Nation or any citizen of that Yukon First Nation may appeal a decision within three months or some other prescribed period. Some citizenship codes provide that the appeal is heard by the Elders Council or the Yukon First Nation’s judicial council or an independent appeal board comprised of citizens appointed by the Chief and Council.

Often the registrar is responsible to forward completed appeal applications to the appeal body. Then the appeal body convenes a hearing within a prescribed period of receiving the applications from the registrar and makes a decision to uphold, vary or overturn any decision of the decision-maker. Perhaps the appeal body has the authority to refer the decision back to the decision-maker for further consideration with specific direction.

An affected person usually has the right to appear before the appeal body in person or by agent.

In most citizenship codes, the decision of the appeal body is final.

It could be interpreted that the appeal processes established in the citizenship code intend to replace the right of appeal to the Dispute Resolution Board rather than establish another level of appeal. Of course, the provisions of a citizenship code are unable to revise or amend a provision of the UFA. Therefore, it seems that these appeal processes would be in addition to the right of appeal to the Dispute Resolution Board under the UFA. This may mean that the applicant would have to exhaust these appeal processes before making an appeal to the Dispute Resolution Board. It is suggested that the citizenship codes should clarify this issue.

4.6 Applications by minors

These provisions of a citizenship code typically provide that an adult may apply for enrollment on behalf of a minor. A minor means a person who is younger than 19 years of age. It is noted that the UFA sets out similar provisions.⁴²

⁴¹ Section 3.10.2 of the UFA.

⁴² Section 3.3.0 of the UFA.

4.7 Loss of citizenship

These provisions in a citizenship code usually provide that the citizenship of a person is annulled or terminated if it is determined that the person: (a) was incorrectly granted enrollment as a citizen or granted citizenship on erroneous or fraudulent grounds; or (b) does not qualify as a citizen. Since the grounds for citizenship usually include satisfying the beneficiary criteria under Chapter 3 of the UFA, this means that the beneficiary status of a person could be annulled or terminated under these provisions.

These provisions may also provide that a citizen may renounce his or her citizenship by giving written notice to the Yukon First Nation. The Yukon First Nation would notify the registrar to remove that person's name from its citizenship list. But a minor does not lose his or her citizenship if his or her parents renounce their citizenship.

A citizen does not lose his or her citizenship if he or she is adopted by a person who is not a citizen of that Yukon First Nation.

4.8 Transfer of citizenship

These provisions provide that a citizen who becomes a citizen of another Yukon First Nation is deemed to have renounced their citizenship.

In some citizenship codes, a person is not permitted to transfer back to the Yukon First Nation after he or she has transferred to another Yukon First Nation for a second time following the attainment of the age of majority.

4.9 Citizenship registrar

Often a citizenship registrar or enrollment officer is established to provide administrative support to the decision-maker. The Chief and Council usually appoints this staff position to carry out certain responsibilities, including the following:

- publicize and provide information relating to the application process;
- receive applications from persons applying for citizenship with that Yukon First Nation;
- provide information and documentation before forwarding the application to the decision-maker;
- notify applicants of the decisions of the decision-maker and advise them in writing of the appeal procedures if the application is rejected;
- when an appeal has been made and considered, notify the applicant of the appeal decision;
- maintain a list of the citizens and their addresses; and
- maintain records and files on all applications and minutes of decision-maker's meetings.

In most cases, the public may review the citizenship list. But it is suggested that addresses and other personal information of citizens not be available publicly.

It is suggested that the Yukon First Nations commit to provide training to the registrars and enrollment officers so that they are able to carry out their responsibilities. Perhaps it would be appropriate for the Yukon First Nations to coordinate this training and provide common or standardized training. Perhaps this training would serve to reduce the turnover in these positions.

The names and contact information for the Yukon First Nations' registrars are set out in the appendices to this manual.

4.10 Rules for the proceedings of the decision-maker

These provisions of the citizenship codes authorize the decision-maker to make rules for the conduct of its proceedings. These rules must provide for fairness and transparency and hopefully they would address the legal principles discussed in the next part.

It is standard for these provisions to require a member of the decision-making body not to participate in any proceedings relating to a person who is a member of the immediate family of that member.

In some provisions, the decision-maker is permitted to seek the advice of the Elders Council.

Often the decision-maker is directed to keep written minutes of its proceedings and file those minutes with the registrar.

4.11 Confidentiality

Usually the information and documents submitted as part of an application are treated as confidential and cannot be released without the written consent of the applicant.

4.12 Review

The citizenship codes do not generally provide for any formal review. However, it is suggested that the each Yukon First Nation undertake a periodic review of its citizenship code and any related policies or procedures from time to time in order to ensure that citizenship issues are being dealt with in an effective and efficient manner.

It is acknowledged that it would not be practicable to revise the citizenship provisions of a Yukon First Nation constitution on a regular basis. Perhaps this emphasizes the need for the constitution to set out general citizenship provisions and the Yukon First Nation to establish the citizenship process in a law.

5. LEGAL PRINCIPLES GOVERNING ENROLLMENT PROCEDURES

It is important that enrollment decisions made by the Chief and Council, an enrollment or citizenship committee or appeal body are made in accordance with certain legal principles. If not, those decisions may be seen as unfair and may be overturned by an appeal body or a court. Overturned decisions would serve to undermine the credibility of the decision-maker and bring disrepute to the enrollment process of the Yukon First Nation.

It is expected that the citizenship codes or enrollment rules would establish processes and procedures based on the following principles. This would ensure that decision-makers and their staff carry out their duties in a transparent manner and determine applications fairly.

5.1 Duty of fairness

Courts require that decision-making that affects the rights of persons must follow a fair process. This duty of fairness means that there must be procedural fairness in decision-making. Decision-makers, such as citizenship committees, that make decisions that are final and binding and have a substantial effect on a person's rights are required to provide significant procedural fairness and duty of fairness, as noted below in this part.

5.2 Participation rights

Participatory rights include pre-hearing rights, such as rights related to notice, disclosure and delay. The applicant should be provided adequate notice and full and fair opportunity to prepare and present his or her application to the decision-maker. There must be full and timely disclosure of the information and materials that is in the possession of the decision-maker to the applicant. The decision-maker must commence its hearing or consideration of the application within a reasonable period of time.

Participatory rights relating to the hearing include rights related to the form of hearing, counsel, examinations and adequate reasons for the decision. In some cases, it may be appropriate for the hearing to be closed to the public or information and materials submitted to the decision-maker as evidence to be treated as confidential.

5.3 Adequate reasons

There must be a rational connection between the evidence presented and the conclusions reached by the decision-maker.

The decision-maker must communicate the decision and the reasons clearly to the applicant within a reasonable period following the hearing or consideration of the application. A clear explanation must be provided in the decision as to how the provisions of the citizenship code were applied to the applicant's application. The decision should be able to stand-alone and must be written so a reasonably informed person can understand it. Adequate reasons should also include the signature of the decision-maker.

Some decision-makers issue written decisions that only discuss the arguments or evidence that they accept. They fail to mention or weigh the arguments they reject. This means that the applicant is often left to question how or why the decision-maker rejected his or her arguments and evidence or whether the arguments and evidence were even considered. It is important for the decision-maker to explain the weigh given to all arguments and evidence put before it.

5.4 Reasonable apprehension of bias

This refers to the relationship of the decision-maker in dealing with issues and the parties in a specific matter. The decision-maker must be impartial and independent from all parties in the matter.

In particular, a reasonable person must conclude that a decision-maker is sufficiently free of factors that could interfere with its ability to make impartial decisions. This is known as the “reasonable apprehensive of bias” test.

This is why some suggest that a Chief and Council should not be a decision-maker with respect to enrollment matters. It may be questioned if the Chief and Council can carry out their duties to review and determine enrollment applications based on the evidence in accordance with the criteria without taking into account any political considerations. Would it be appropriate for a Chief and Council to convene a hearing with respect to an enrollment application?

5.5 Legitimate expectation

The decision-maker must follow its rules and procedures. If a decision-maker makes a commitment that certain procedures will occur and it does not, the decision-maker should be required to fulfill the commitment as long as it does not interfere with the duties and responsibilities of the decision-maker.

Failing to meet legitimate expectations in decision-making may be as simple as an official failing to follow through after agreeing to take a certain action. It becomes more complex if the decision-maker fails to follow what may be considered a standard procedure, resulting in a person being treated in an unfair manner.

This underlies the need for rules and procedures to be set out clearly in writing.

5.6 Exercising power

The decision-maker’s discretion under the citizenship code cannot be exercised in bad faith, for improper purpose or be based on irrelevant considerations.

5.7 Was the decision reasonable?

A reasonable decision does not mean whether the decision is wrong or whether it might have been decided in a different way. A reasonable decision should indicate how the decision-maker

considered and assessed the arguments and evidence. The decision must be based on supporting evidence.

6. KEY ISSUES TODAY

Although the process for enrolling beneficiaries of the land claim agreements commenced more than forty years ago, the enrollment work continues today. Persons who were adopted years ago make applications for enrollment from time to time. Newborns need to be enrolled. Beneficiaries may transfer their enrollment under one Final Agreement to a different Final Agreement. It is expected that this work will be ongoing.

In addition, courts have recently broadened the legal meaning of “Indians”⁴³ and this may increase the number of status registrations for Yukon First Nations. This may mean that some non-status citizens of the Yukon First Nations are now eligible for status registration. Since it would be in the best interests of the Yukon First Nations to ensure that these citizens are registered as status Indians in order to increase its federal funding, the Yukon First Nations should provide assistance to their citizens who are seeking registration as status Indians.

Today Yukon First Nations are dealing with a number of issues relating to enrollment, including the following.

6.1 A beneficiary here and status Indian there

As noted above, each Yukon First Nation has separate lists of its status Indians, beneficiaries and citizens. The names on these various lists may not match up. For instance, a status beneficiary may be on the Yukon First Nation’s list of status Indians but on the beneficiary list of another Yukon First Nation. This issue has been referred to as “dual citizenships.” It creates governance and administrative challenges for the Yukon First Nations.

These three lists are described below.

- A **list of status Indians** for each Yukon First Nation is maintained by AANDC. This list of status Indians is known as the Indian Registry and it includes the persons who are entitled to be registered as “Indians” within the meaning of the *Indian Act*. But the name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Indian

⁴³ See *Canada (Indian Affairs) v. Daniels*, 2014 F.C.A. 101 (CanLII). In this decision, the Court declared that Metis are included as “Indians” within the meaning of section 91(24) of the *Constitution Act, 1867*. The Supreme Court of Canada announced its decision to grant leave to hear the appeal of this decision. The hearing of this appeal is expected in 2015. In *Mclvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 B.C.C.A. 153 (CanLII), the Court found that sections 6(1)(a) and 6(1)(c) of the *Indian Act* are of no force and effect and suspended its declaration of invalidity for one year to allow time for Parliament to act. The Supreme Court of Canada dismissed Ms. Mclvor’s application for leave to appeal.

Registrar.⁴⁴

It is maintained by the Indian Registrar – an employee of AANDC – who is the sole authority to determine which names will be added, deleted or omitted from the Registry.

Section 14.1 of the *Indian Act* provides that any person may inquire and be advised whether his or her name is included in the Indian Registrar. But this section does not confer any general right for the public to know whether or not a particular person is a status Indian. The *Indian Act* seems to treat this information as confidential.

Information, including application forms, relating to status registration in the Indian Registrar is included in the appendices of this manual.

- The **beneficiary list** identifies the beneficiaries of each Yukon First Nation. This list is determined by the criteria set out in Chapter 3 of the UFA. Since this criteria does not include any requirement for a beneficiary to be a status Indian, a beneficiary may be non-status Indian and not included on the Yukon First Nation's list of status Indians maintained by AANDC.
- Each Yukon First Nation maintains its **citizenship list** in accordance with its citizenship code. In general, the citizenship list includes all the persons who are on either that Yukon First Nation's beneficiary list or status Indian list. As noted above, all beneficiaries of a Yukon First Nation must be permitted to be citizens.⁴⁵

This means that the citizenship list includes status beneficiaries, non-status beneficiaries and status non-beneficiaries of that Yukon First Nation.

These three lists have created much confusion because, in some cases, a person may be enrolled as a beneficiary with one Yukon First Nation and also be registered as a status Indian with another First Nation elsewhere in the Yukon or Canada. This is concerning for the Yukon First Nations since the federal funding provided to a Yukon First Nation under its financial transfer agreement is based on the number of status Indians registered with that Yukon First Nation, not the number of beneficiaries or citizens of that Yukon First Nation.

Some Yukon First Nation people may be enrolled as a beneficiary with one Yukon First Nation because they have family or cultural ties to that area or grew up in that area and they may be registered as a status Indian with a different First Nation for many reasons. Perhaps they were registered under another First Nation as child. Perhaps one of their parents is registered with a different First Nation. Perhaps they transferred their status Indian registration to another First Nation in order to access benefits, such as housing, employment or programs and services.⁴⁶

⁴⁴ Entitlement to status registration is based on a set of rules found in section 6 of the *Indian Act*. The rules in section 6 are subject to the exclusions found in section 7.

⁴⁵ Section 10.1.3 of the Self-Government Agreements.

⁴⁶ It should be noted that the Yukon First Nations have implemented some measures so they can provide certain programs and services to a citizen of another Yukon First Nation and recover the costs back from that citizens' Yukon First Nation.

Whatever the reason, the Yukon First Nations have recognized the need for a person to be both enrolled as a beneficiary and, if he or she is a status Indian, registered as a status Indian with the same Yukon First Nation. This would ensure that the Yukon First Nations are receiving their fair share of federal funding under the financial transfer agreements. It would be respectful of cultural practices and promote community cohesiveness.

In response to this issue, Yukon First Nations have been collaborating and sharing information about their respective beneficiary and citizenship lists in order to encourage people to be enrolled and registered with the same Yukon First Nation. Any resolution of the dual citizenship issue will require administrative commitment from each Yukon First Nation to work collaboratively. Perhaps registrar and enrollment officers will need to meet periodically to share lists and coordinate approaches. Perhaps the Yukon First Nations will need to establish consistent policies and procedures to ensure that there is a common approach to address this issue.

In fact, the Yukon First Nations are discussing the establishment of a central registry for beneficiary and citizenship matters. As discussed below, this collaboration and sharing must respect the privacy of personal information.

But these efforts have been hindered since AANDC is not willing to share the status Indian lists with the representatives of the Yukon First Nations. While AANDC is willing to share the number of status Indians registered with each Yukon First Nation, they are not willing to share names. This means that a Yukon First Nation cannot confirm if its status beneficiaries are also registered as status Indians with it.

Political will from the Yukon First Nations will also be required. Any resolution will likely require significant resources and time. Moreover, some citizens may oppose efforts to require them to be enrolled as beneficiaries and registered as status Indians with the same Yukon First Nation.

6.2 Freeze of enrollment applications

As noted above, Yukon First Nations recognize the need for a person to be enrolled as a beneficiary and, if he or she is a status Indian, to registered as a status Indian in one Yukon First Nation. To that end, there have been efforts to encourage people to transfer their enrollment as beneficiaries to the Yukon First Nation where they are registered as status Indians, or vice versa. In other cases, non-status beneficiaries have been encouraged to transfer to the Yukon First Nations where they have family or cultural ties.

However, some Yukon First Nations have refused to make decisions about applications for transfer of beneficiaries pending the resolution of the issues discussed above in this part. In other words, there is an enrollment freeze and, in some cases, the freeze may have been in place for several years.

While there may be compelling reasons to implement such a freeze, it is suggested that a freeze is unfair to applicants and obstructs the efforts of Yukon First Nations to resolve its citizenship

issues, including dual citizenships. It has been suggested that the application freezes should be lifted so the dual citizenships can be addressed.

In any event, the Yukon First Nation's refusal to process applications under a freeze gives rise to an appeal. As noted above, where a Yukon First Nation fails or neglects to make a decision within 120 days, then that application is deemed to have been rejected and a right of appeal lies to a single arbitrator appointed by the chairperson of the Dispute Resolution Board. Therefore, the application freezes seem to be ineffective and only serves to compound the frustration with respect to the outstanding issues.

6.3 Privacy issues

Yukon First Nations now administer their citizenship lists in accordance with their citizenship codes and these lists may include personal information about their citizens. Some Yukon First Nations have committed to share their citizenship lists, including enrollment information, with other Yukon First Nations for governance purposes.

It is a reasonable expectation that the personal information held by the Yukon First Nations relating to enrollment – such as birthdates, genealogy information and addresses – would be treated as confidential information and not disclosed publicly. If such personal information is disclosed publicly, the Yukon First Nation could be found to be civilly liable by a court in an action for invasion of privacy⁴⁷ or breach of confidence.⁴⁸

Most Yukon First Nations have not enacted any laws that address information management or regulates the collection, use and distribution of personal information by them. This means federal and territorial laws continue to apply to a Yukon First Nation and its citizens and settlement land in accordance with the Self-Government Agreement, unless the Yukon First Nation enacts a law under its Self-Government Agreement.

But since the federal⁴⁹ and territorial⁵⁰ laws regulating the privacy obligations of government do not specify a Yukon First Nation as a public body or government that is subject to the legislation, they do not impose any legal obligations on the Yukon First Nation in respect of its records, including its enrollment information.

⁴⁷ Some Canadian jurisdictions – but not the Yukon – have enacted legislation creating a cause of action for invasion of privacy. In jurisdictions without this type of legislation, some Canadian courts have recognized a common law tort for invasion of privacy.

⁴⁸ A cause of action for breach of confidence can be used where personal information is disclosed, but only where the defendant received the information knowing that it was confidential and accepted it on that basis.

⁴⁹ The *Privacy Act* (Canada) is federal legislation that applies to "government institutions" which are listed in the schedule to the *Act*. The schedule does not list any Yukon First Nation. Therefore, the *Privacy Act* does not apply directly to personal information in the records of the Yukon First Nations. The *Personal Information Protection and Electronic Documents Act* (Canada) is a federal law that applies to entities which are not covered by the *Privacy Act*. The *Personal Information Protection and Electronic Documents Act* may apply to a Yukon First Nation in respect of its commercial activities and its employee records. But it does not apply to the Yukon First Nations in respect of their governance activities and functions.

⁵⁰ The *Access to Information and Protection of Privacy Act* (Yukon) applies to all records in the custody of, or under the control of a public body. But its definition of public body does not extend to any self-governing Yukon First Nation.

It is suggested that the Yukon First Nations consider the enactment of access to information and privacy law under section 13.1.1 of its Self-Government Agreement to regulate the collection, use and distribution of records and information, including enrollment information. Such a law would provide guidelines to the Yukon First Nations and clarity and certainty to their citizens with respect to the treatment of personal information collected and held by it. Ideally these laws made by Yukon First Nations would be consistent in order to promote the sharing of enrollment information.

Until a Yukon First Nation enacts an access to information and privacy law, the Yukon First Nation should enter into an agreement with any Yukon First Nation that it intends to share enrollment information with. This agreement would confirm that the personal information relating to the enrollment information would be treated confidentiality and not be disclosed publicly.